83-539

No.

IN THE

Supreme Court of the United States

October Term, 1983

ARTHUR ANDERSEN & CO.,
COOPERS & LYBRAND,
ALEXANDER GRANT & COMPANY,
SOCIETE COMMERCIALE DE REASSURANCE and
SCOR REINSURANCE COMPANY,
Petitioners,

v.

JAMES W. SCHACHT, the Acting Director
of Insurance of the State of Illinois and
Liquidator of Reserve Insurance Company,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether Congress, in enacting the Racketeer Influenced and Corrupt Organizations ("RICO") Title of the Organized Crime Control Act of 1970, 18 U.S.C. §§ 1961-1968, intended to create a private treble damage cause of action for every common law fraud involving two or more uses of the United States mails, thereby creating, as the court of appeals held, a "runaway treble damage bonanza" and "a dramatically expansive, and perhaps insufficiently discriminate, tool for combating organized crime."

2. Whether, if such cause of action exists, it may be asserted by a corporation which (a) initiated the alleged fraud through the acts of its officers and directors, (b) has no fraud claim of its own, and (c) seeks recovery on behalf of its creditors, shareholders and other third parties already suing for their own alleged injuries.

3. Whether an independent auditor or a reinsurer, respectively, conducts or participates in the conduct of the affairs of an "enterprise," in violation of 18 U.S.C. § 1962(c), by merely examining and issuing a report or opinion upon allegedly false financial statements of the enterprise in the one case, or entering into a reinsurance agreement with the enterprise in the other case.

PARTIES BELOW

The plaintiff is the Acting Director of Insurance of the State of Illinois and Liquidator of Reserve Insurance Company. The defendants are two reinsurance companies, two wholly-owned subsidiaries of American Reserve Corporation, the former officers and directors of Reserve Insurance Company, and three outside accounting firms that served as auditors of Reserve and/or its parent. [1]

The petitioners are the independent accounting firms [defendants in counts III and IV of the complaint (App. 23f-29f)] and the two reinsurance companies [defendants in counts I and II of the complaint (App. 30f-35f)].*

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[1] Specifically, the defendants are (a) reinsurance companies: Societe Commerciale De Reassurance ("SCOR") and Scor Reinsurance Company; (b) two wholly-owned subsidiaries of American Reserve Corporation: Guaranty Reinsurance Company and Reserve Insurance Managers, Ltd.; (c) former officers and directors: Isidore Brown, Roger O. Brown, Jules Dashow, Walter Y. Elisha, Norman M. Gold, Burton I. Koffman, Wallace J. Stenhouse, Jr., Hugo Uyterhoeven, Anthony M. Tortoriello, Donald J. Clarkin, Jerrold N. Fine, John W. Muldoon, Stanton L. Subeck, Michael L. Meyer, and John J. Tickner; and (d) the independent accounting firms: Arthur Andersen & Co., Coopers & Lybrand, and Alexander Grant & Company.

* Pursuant to Supreme Court Rule 28.1 petitioners provide the following information:

Arthur Andersen & Co., Coopers & Lybrand and Alexander Grant & Company are partnerships.

Societe Commerciale de Reassurance ("SCOR") is primarily owned by Caisse Centrale de Reassurance. SCOR's partially-owned subsidiaries are: SCOR U.S. Corporation; Gibraltar General Insurance Company; Anglo-Canada General Insurance Company; Forescor; Immoscor; and S.I.C.A.V. Placements-Reassurance. SCOR also has minority ownership interests in Anglo Permanent Corporate Holding Limited and S.C.D.R. Investments Limited. Scor Reinsurance Company is a wholly-owned subsidiary of SCOR U.S. Corporation and has a single affiliate, Southwest International Reinsurance Company.

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The opinion of the United States Court of Appeals for the Seventh Circuit (App. 1a-37a)[2] by Circuit Judge Wood, joined by Chief Circuit Judge Cummings and Senior District Judge Walter Hoffman, is reported at 711 F.2d 1343 (7th Cir. 1983). The reported opinion reflects an order of July 1, 1983 (App. 1b-2b) modifying the court of appeals' initial opinion, denying rehearing, and noting the dissenting votes of Circuit Judges Eschbach and Posner to rehear the case *en banc*.

The opinions of the district court (App. 1c-7c & 1d-2d) are not reported.

JURISDICTION

Petitioners seek review of the judgment of the court of appeals dated and entered April 8, 1983 (App. 1e), as modified by the above-described order entered on July 1, 1983. This petition is filed within ninety days of the order of July 1, 1983. This Court has jurisdiction to review the judgment by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The treble damage provision of the Racketeer Influenced and Corrupt Organizations ("RICO") Title of the Organized Crime Control Act of 1970, 18 U.S.C. § 1964(c), provides as follows:

> "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."

Other pertinent provisions of RICO are set forth in the Statutory Appendix. (pp. A-1 to A-6, *infra*)

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[2] Appendices except for the Statutory Appendix (pp. A-1 to A-6, *infra*) are separately bound.

STATEMENT

This case arises from the insolvency of an insurance company, Reserve Insurance Company ("Reserve"), a wholly-owned subsidiary of American Reserve Corporation ("ARC"). The basic allegations are that audited consolidated financial statements of ARC (a public company now in bankruptcy) and its subsidiaries from 1974 through 1977 underestimated the claims costs (or "loss reserves") of Reserve and failed to disclose reinsurance agreements and thereby concealed Reserve's insolvency; that these financial statements and documents relating to the reinsurance agreements were disseminated through the U.S. mails; and that these financial statements and documents relating to the reinsurance agreements defrauded Reserve, its policyholders, creditors and shareholders and the state insurance department, thereby enabling Reserve to continue in business and go deeper into insolvency until Reserve's liquidation began in 1979. Damages of $100 million to Reserve are alleged, trebled to $300 million. The complaint (App. 1f-70f) names as defendants the officers and directors of ARC and Reserve; two reinsurance companies; two wholly-owned subsidiaries of ARC; and three independent accounting firms that served as ARC's and/or Reserve's auditors during successive periods.

More than a half dozen lawsuits, in both state and federal court, have been brought arising from the collapse of ARC and its subsidiaries. The first federal suit was brought by shareholders of ARC, asserting claims under the federal securities laws. Various other suits (including this one) followed, each repeating the same basic allegations.[3] The complaint in this

[3] The remaining suits are: *Epstein v. American Reserve Corporation*, N.D. Ill. No. 79-C-4767 (ARC shareholders); *Holland v. Arthur Andersen & Co.*, and *Holland v. Alexander Grant & Co.*, Circuit Ct. of Cook County Ill., Nos. 82-L-20763 and 82-L-20764, respectively (ARC trustee in bankruptcy); *LaSalle National Bank v. Stenhouse*, Circuit Ct. of Cook County Ill., No. 82-L-17602 (creditor banks); *Caldarone v. Brown*, N.D. Ill. No. 80-C-6251 (permanent receiver of American Reserve Insurance Company "ARIC"); and *Huddleston v. American Reserve Corp.*, Circuit Ct. of Cook County Ill., No. 79-CH-3717 (Reserve policyholders). While the instant case was the first to advance a RICO claim, plaintiffs in the *Epstein*, *Caldarone*, and *Holland* lawsuits have now brought RICO claims as well.

case is unique, however, because it was the *first* to seek treble damages and the *first* to base federal jurisdiction exclusively upon RICO.

A. The Allegations Of Fraud And Injury.

The complaint purports to allege a common law fraud. The complaint alleges that, had Reserve's insolvency not been concealed, Reserve would have been shut down by the state insurance department. Concealment of the insolvency, therefore, allegedly allowed Reserve to remain in business for a time during which it was driven "deeper into insolvency." (App. 2a)

The complaint alleges that the perpetuation of Reserve in business caused injury not only to Reserve but also to policyholders, creditors and shareholders of Reserve. (App. 2a) Although plaintiff purports to represent those policyholders, creditors and shareholders (who would benefit from any recovery by plaintiff), the court of appeals held that the plaintiff, as successor to Reserve's claims, could assert only injury to Reserve itself—*i.e.*, the deepened insolvency. (App. 6a n.3) The court of appeals also recognized (amending its initial opinion) that since any recovery by Reserve would inure to the benefit of Reserve's policyholders, creditors, and shareholders, any recovery by the plaintiff in this case should result in a reduction of any damages otherwise recoverable by those separate claimants.[4] (App. 2b)

B. The Fraud-Based RICO Claim.

RICO, the sole purported basis for federal jurisdiction and treble damages in this case, is divided into definitional, proscriptive, and remedial or punitive parts. The *definitional* part provides that "racketeering activity" consists of offenses (frequently called "predicate acts") under state or other federal laws, including the federal mail and wire fraud statutes, 18 U.S.C. § 1961(1). The commission of any *two* of such predicate acts within a 10-year period is sufficient to constitute a "pattern of racketeering activity," 18 U.S.C. § 1961(5).

[4] The order of July 1 (App. 1b), among other things, deleted footnote 5 of the earlier opinion (App. 11a), which erroneously stated that the extent of duplicative litigation had not been called to the court's attention.

The *proscriptive* part of RICO, 18 U.S.C. § 1962, prohibits conduct that differs from commission of the predicate acts, specifically:

— the *investment* of "income derived" from a "pattern of racketeering activity" into an enterprise (18 U.S.C. § 1962(a));

— the *acquisition* of an enterprise "through a pattern of racketeering activity" (18 U.S.C. § 1962(b)); or

— the *conduct of the affairs* of an enterprise "through a pattern of racketeering activity" (18 U.S.C. § 1962(c)).[5]

Finally, RICO provides for *sanctions.* Criminal and civil sanctions may be sought by the government (18 U.S.C. §§ 1963, 1964(a) and 1964(b)). Under 18 U.S.C. § 1964(c), a private treble damage action is available to a person "injured in his business or property by reason of a violation" of the proscriptive part, 18 U.S.C. § 1962. This case was brought pursuant to § 1964(c).

With respect to the independent accounting firms, the complaint charges in Count IV (App. 32f-35f) that the annual mailings of allegedly false consolidated financial statements of ARC or Reserve which were examined and reported upon by the outside independent auditors (Arthur Andersen & Co. for the years 1974 and 1975; Coopers & Lybrand for 1976; and Alexander Grant & Company for 1976 and 1977) concealed the effect of the reinsurance agreements and the insolvency of Reserve, violated the mail fraud statute, and constituted "racketeering activity," 18 U.S.C. § 1961(1). Because more than two annual mailings are alleged, the complaint charges that the mailings constituted a "pattern of racketeering activity," 18 U.S.C. § 1961(5). (App. 34f ¶ 94) The complaint makes similar charges in Count II (App. 27f-29f) against the reinsurance companies and alleges that they transmitted documents relating to the reinsurance agreements through the mails.

[5] 18 U.S.C. § 1962(d) proscribes conspiracy to violate the provisions of subsections (a), (b) or (c).

The mailed financial statements and mailed documents relating to the reinsurance agreements allegedly defrauded Reserve, its policyholders, creditors and shareholders and the state insurance department, enabling Reserve to continue to operate its insurance business while insolvent and to increase further its indebtedness until liquidation began in 1979. The court of appeals, disregarding what it referred to as the "technical deficiencies" in the complaint, concluded that the complaint could be construed to allege "injury to Reserve as a result of [all] defendants' direct or indirect participation in the conduct of ARC's affairs through the alleged mail fraud in such a manner as to artificially prolong Reserve's existence and worsen its insolvency and losses." (App. 16a) The court of appeals concluded that, as so construed, the complaint "at least arguably" stated a violation of 18 U.S.C. § 1962(c). (App. 19a)

C. Proceedings And Decisions Below.

Defendants moved in the district court to dismiss the complaint on the ground, among others, that it did not state a claim for treble damages under RICO. The district court (Hon. Thomas R. McMillen) denied the motions to dismiss but certified its decision for interlocutory review pursuant to 28 U.S.C. § 1292(b) (App. 1d-2d) and the court of appeals accepted the appeal.[6]

After briefing and oral argument the court of appeals affirmed the denial of motions to dismiss. The court of appeals held that Reserve's deepening insolvency during the time it was perpetuated in business by the alleged predicate acts of mail fraud was an injury to Reserve's "business or property" caused by the "arguabl[e]" violation of 18 U.S.C. § 1962(c) and therefore was enough to enable Reserve to seek treble damages under 18 U.S.C. § 1964(c). However, Reserve's injury, if any, is alleged to have resulted solely from predicate acts—the mailing of the allegedly false financial statements and documents relating to the reinsurance agreements.

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[6] Prior to deciding whether to certify its decision, the district court urged the plaintiff to amend the complaint if he intended to do so, because the district court did not want to certify merely a question of interpretation of the complaint. Plaintiff elected to stand on the complaint. (App. 17a, n.8)

The opinion of the court of appeals thus invites a treble damage action for every alleged fraud involving two or more uses of the mails, despite the fact that Congress has never provided a private damage remedy for mail fraud. The court of appeals acknowledged that its conclusion would federalize "the common law of 'garden variety' business fraud." (App. 20a) Indeed, the court recognized that its opinion presaged a "dramatic" and "vast" expansion of federal jurisdiction that would swallow up common law fraud, eclipse litigation under the federal securities laws, and set in motion a "runaway treble damage bonanza for the already excessively litigious." (App. 20a, 36a) But the court of appeals considered itself powerless to avoid this result because the federal mail fraud statute had caused "a realignment of the federal-state role . . . in the criminal sphere" (App. 23a) and because the court was unable to discern any "legitimate principled criterion" by which private RICO suits could be limited to avoid this result. (App. 26a)

The court of appeals also held that Reserve (in whose shoes the plaintiff stands) was a proper plaintiff, even though all of its officers and directors allegedly took part in the underlying fraud charged in the complaint. The court acknowledged that principles of tort law would bar recovery on behalf of Reserve in a common law fraud case, but held that unspecified "federal policies" under RICO justified a different result. (App. 7a) Thus, the court of appeals' opinion permits treble damages in business fraud cases under RICO even where single damages are not recoverable at common law.

Finally, the court of appeals concluded that 18 U.S.C. § 1962(c) applies to anyone "associated with" an enterprise [ARC] and ignored the absence of any allegation in the complaint as to another essential element of a § 1962(c) violation—*conducting* the affairs of the enterprise [ARC]—which requires actual participation in the *operation* or *management* of the enterprise itself. The examination of and reporting upon the financial statements of an enterprise by an independent auditor does *not* constitute participation in the operation or management of the enterprise. Nor does entering into a reinsurance agreement constitute such participation.

A timely petition for rehearing and suggestion for rehearing *en banc* was denied with two Circuit Judges (Judges Eschbach and Posner) dissenting and voting to rehear the case *en banc*.

REASONS FOR GRANTING THE WRIT

This case presents issues of great importance to the proper guidance and administration of the federal courts and to the relationship between federal and state private remedies. Contrary to the express intention of Congress, and contrary to the decisions of other courts, the court of appeals ignored all principled limitations on the cause or type of injury necessary for recovery in private RICO treble damage actions. The unsupportable result of this interpretation of RICO by the court of appeals is the complete federalization of the law of fraud and the evisceration of principled limitations upon private remedies under other federal statutes, such as the securities laws.

The proper interpretation of RICO's provision for private treble damage suits is a matter of overwhelming importance. Absent review by this Court, the decision below will stimulate efforts to transform "garden variety" fraud claims into federal treble damage claims under RICO, which recently have increased dramatically. Moreover, as shown below and as indicated by the court of appeals' opinion itself, many lower court decisions have produced a state of disarray concerning the precise scope of the RICO private treble damage provision.

In these circumstances, the intervention of this Court at this time is critical. While this Court has previously addressed the criminal provisions of RICO, *see United States v. Turkette*, 452 U.S. 576 (1981), it has yet to address the provision for treble damage claims[7] — a private remedy which, lacking the control

[7] In *Turkette* this Court referred to civil provisions of RICO only to indicate that they have more limited scope than the criminal provisions, 452 U.S. at 585—an observation not heeded by the court below. This Court has granted a petition for certiorari in *Russello v. United States*, No. 82-472, *cert. granted*, 51 U.S.L.W. 3508 (Jan. 10, 1983), a case that concerns the government's use of the forfeiture provisions of 18 U.S.C. § 1963.

of prosecutorial discretion,[8] presents a special need for authoritative judicial guidance. This case presents the opportunity for this Court to define authoritatively the limitations on RICO treble damage actions, without impinging upon the public enforcement provisions of the statute. Although the case has not progressed beyond an early stage, this Court has reviewed cases in a similar procedural posture to decide important questions of law. *See, e.g., Associated General Contractors of California, Inc. v. California State Council of Carpenters,* 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983); *Touche Ross & Co. v. Redington,* 442 U.S. 560 (1979); *Ernst & Ernst v. Hochfelder,* 425 U.S. 185 (1976). In this case, the court of appeals decided questions of law of major importance that are properly presented for review. Immediate review is justified, since postponement of review to await a case that has reached final judgment after trial would leave district courts to confront a growing multitude of private RICO cases without guidance for several years.

I. THE DECISION OF THE COURT OF APPEALS INVITING FEDERALIZATION OF COMMON LAW FRAUD UNDER THE RICO TREBLE DAMAGE PROVISION DESERVES REVIEW BY THIS COURT.

Under the private treble damage provision of RICO, 18 U.S.C. § 1964(c), treble damages are available to a person

> "injured in his *business or property by reason of a violation* of [18 U.S.C.] Section 1962. . . ." (emphasis added).

The opinion of the court of appeals invites any plaintiff whose injury is caused by an alleged common law fraud involving two or more uses of the mails to bring a RICO treble

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[8] Criminal prosecutions are governed by the RICO Guidelines of the United States Department of Justice, 5 Trade Reg. Rep. (CCH) ¶ 50, 452, which are described in *United States v. Ivic,* 700 F.2d 51, 64 (2d Cir. 1983). The Guidelines played an important role in the position of the government before this Court in *Turkette,* where the government assured this Court that "sound discretion" would be exercised in bringing RICO prosecutions, all of which had to be "reviewed and authorized by the Criminal Division of the Department of Justice in Washington, D.C." *United States v. Turkette,* Brief for the United States at 25 n.20.

damage action, alleging that an "enterprise" was conducted "through" a "pattern of racketeering activity," consisting of the mail fraud. The opinion rejects any limitation on the cause or type of injury cognizable under RICO and, in effect, invites a private treble damage suit for any injury flowing solely from predicate acts. The result, as acknowledged by the court of appeals, is a federalization of common law fraud causes of action. The impact of such a holding alone justifies this Court's review. Review is also needed because the court of appeals ignored congressional intent as reflected by the statutory language and legislative history.

A. The Impact Of The Decision Below Justifies Review.

If the decision below is allowed to stand, the private treble damage provision of RICO will have the greatest impact upon the case load of the federal judiciary since the original grant of diversity jurisdiction. Only by heeding the express intention of Congress and applying principled limitations upon the cause and type of injury redressable under RICO can the treble damage provision be kept from becoming a vehicle for complete federalization of common law fraud claims. This is imperative because of the inclusion among the predicate acts, 18 U.S.C. § 1961(1), of mail and wire fraud and the widespread use of the mails and wires in ordinary business transactions.

The court of appeals' rejection of any such principled limitation brings large areas of state law into the federal sphere and displaces important areas of federal law as well. Prominent among the federal statutes affected are the federal securities laws. Under the decision below, RICO treble damage claims will either displace express and implied remedies under the securities laws or will constitute still another charge to fling at and confuse a jury.[9] The carefully crafted express remedies

[9] Thus, as illustrated in related actions here (see n.3 *supra*), a shareholder allegedly deceived by financial statements or press releases could attempt to transform what would otherwise be a common law or securities fraud claim into a RICO claim. In such a case, two or more uses of the mails, or alleged securities law violations, would establish the requisite predicate acts

(footnote continues)

under the Securities Act of 1933 and the Securities Exchange Act of 1934, *see Ernst & Ernst v. Hochfelder, supra,* 425 U.S. at 195, 206-211, will be rendered superfluous. Limitations on those express remedies—such as the provisions that limit a claimant to "actual damages," *e.g.,* 15 U.S.C. § 78bb—will be eviscerated. Limitations on implied private actions—such as the purchaser-seller rule, *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723 (1975)—as well as this Court's refusal to imply private actions, *e.g., Touche Ross & Co. v. Redington, supra,* will be stripped of practical significance. The "danger of vexatious litigation" that presently accompanies securities claims, *Blue Chip Stamps, supra,* 421 U.S. at 740, will be exacerbated with a vengeance, as allegations of "racketeering" triple the *in terrorem* effect of securities class actions.

The consequences of the court of appeals' interpretation of the RICO treble damage provision are not confined to securities litigation, however. The decision below invites litigants to couch virtually any fraud allegation in the language of RICO. Such a reading of RICO completely circumvents prior congressional decisions not to provide a private damage remedy for mail fraud[10] or for "deceptive" practices violative of § 5 of the Federal Trade Commission Act.[11]

The lure of an unchecked private RICO remedy as a basis for federal jurisdiction can already be seen in an increasing

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(footnote continued)

for a "pattern of racketeering activity;" the corporate issuer would constitute the alleged "enterprise;" and a variety of potential defendants would be vulnerable to an allegation that they were persons "employed by or associated with" the "enterprise"—*i.e.,* the issuer—who "conducted or participated in the conduct of the affairs" of the enterprise "through a pattern of racketeering activity"—*i.e.,* the mail fraud or alleged securities law violations—thereby violating 18 U.S.C. § 1962(c). For an additional illustration of this phenomenon, *see, e.g., Harper v. New Japan Securities Int'l, Inc.,* 545 F. Supp. 1002, 1008 (C.D. Cal. 1982).

[10] *See Ryan v. Ohio Edison Co.,* 611 F.2d 1170, 1177-1179 (6th Cir. 1979); *Bell v. Health-Mor, Inc.,* 549 F.2d 342 (5th Cir. 1977) (no private action for mail fraud).

[11] *See, e.g., Alfred Dunhill Ltd. v. Interstate Cigar Co.,* 499 F.2d 232, 237-238 (2d Cir. 1974); *Carlson v. Coca-Cola Co.,* 483 F.2d 279, 280-281 (9th Cir. 1973) (no private action under § 5 of the FTC Act).

number of suits whereby litigants are attempting to use RICO to bring breach of contract, commercial bribery, and a variety of other business tort cases into the federal courts.[12] Indeed, some commentators have suggested that responsible lawyers are duty bound to use RICO to secure federal jurisdiction over what are otherwise doubtful claims.[13]

Whether Congress intended this result when it enacted the private treble damage provision of RICO as part of the Organized Crime Control Act of 1970 is obviously an issue worthy of this Court's attention. Unless review is obtained now, lower federal courts will become inundated with RICO treble damage suits whose ultimate jurisdictional status will remain uncertain.

B. The Reading Of The RICO Treble Damage Provision Given By The Court Of Appeals Is Contrary To The Intent Of Congress.

If Congress had intended the RICO treble damage provision to have the consequences just described—consequences envisioned by the court below when it labeled the provision a "runaway treble damage bonanza for the already excessively litigious"—one would expect to find a clear statement to that effect, either in the statute or in its legislative history. *Compare Santa Fe Industries, Inc. v. Green,* 430 U.S. 462, 479 (1977)

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[12] *See, e.g., Dan River Inc. v. Icahn,* 701 F.2d 278 (4th Cir. 1983) (takeover litigation); *Meineke Discount Muffler Shops, Inc. v. Noto,* 548 F. Supp. 352 (E.D.N.Y. 1982) (allegations of common law fraud, breach of contract, and trademark infringement); *State Farm Fire and Cas. Co. v. Estate of Caton,* 540 F. Supp. 673 (N.D. Ind. 1982) (insurance fraud); *Bays v. Hunter Savings Assoc.,* 539 F. Supp. 1020 (S.D. Ohio 1982) (dispute concerning adequacy of disclosure of mortgage terms); *Van Schaick v. Church of Scientology of California, Inc.,* 535 F. Supp. 1125 (D. Mass. 1982) (action for fraud and infliction of emotional trauma); *Salisbury v. Chapman,* 527 F. Supp. 577 (N.D. Ill. 1981) (fraud in real estate transaction).

[13] *See* 45 Antitrust & Trade Reg. Rep. (BNA) at 235 (1983) (quoting commentator as recommending that "responsible clients and counsellors" consider asserting a RICO claim to bolster an antitrust claim that presents "a problem with standing" and suggesting that the suit rejected by this Court in *Associated General Contractors, Inc., supra,* could succeed as a RICO suit). *See also* Pray, "Application of the Racketeer Influenced and Corrupt Organizations Act (RICO) to Securities Violations," 8 J. Corp. Law 411 (1983); "RICO Attack On Pension Plan Counsel Attempted," *Legal Times,* August 15, 1983 at 7.

(Congress cannot be presumed "absent a clear indication" to "federalize" large areas of state law). In the case of RICO, there is *no* such statement. Indeed, both the language and legislative history of RICO indicate that the private treble damage provision—added late in the process of enacting this predominantly *criminal* statute[14]—was not intended to affect such far-ranging upheavals in the relationship between federal and state *private* remedies. Although language and legislative history are enough to refute any contention that Congress intended to federalize common law fraud under RICO, the same conclusion is supported by accepted principles of statutory interpretation that subordinate even very broad language to a clearly discerned statutory purpose. *See Associated General Contractors of California, Inc., supra; Brunswick Corp. v. Pueblo Bowl-O-Mat,* 429 U.S. 477 (1977).

1. The decision of the court of appeals conflicts with the statutory language.

The statutory language, which makes treble damages available to a person "injured in his business or property by reason of a violation of § 1962," negates an intent to create a treble damage remedy simply for injury caused by mail fraud (as to which no private action has ever existed, even for single damages) or any of the other predicate acts. If Congress had intended to enact a remedy for predicate acts like mail fraud, it could have done so by providing for damages to any person injured by reason of a pattern of racketeering activity as defined in § 1961. As recognized by a number of courts, Congress' choice of different language, requiring injury "by reason of *a violation of § 1962*" (emphasis added) shows that adding a remedy for predicate acts listed in § 1961 was not Congress' intent.[15]

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[14] *See* note 17, *infra.*

[15] *See Erlbaum v. Erlbaum,* [1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,772 at 93,922 (E.D. Pa. 1982) ("[i]f Congress [had] intended that § 1964 compensate injuries caused by racketeering activity it could have made reference to § 1961(1) rather than § 1962.") *Accord, e.g., Bays v. Hunter Savings Assoc. supra,* 539 F. Supp. at 1023; *Harper v. New Japan Securities Int'l, supra,* 545 F. Supp. at 1005-1008; *Van Schaick v. Church of Scientology, supra,* 535 F. Supp. at 1135-1137; *Adair v. Hunt International Resources Corp.,* 526 F. Supp. 736, 746-748 (N.D. Ill. 1981); *Kleiner v. First National Bank of Atlanta,* 526 F. Supp. 1019, 1022 (N.D. Ga. 1981).

The express requirement of "business or property" injury under 18 U.S.C. § 1964(c) confirms this conclusion. A reference to "business or property" injury excludes personal injury, *see Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979), and Congress would not have enacted this exclusionary language if its intention had been to create a treble damage remedy for victims of predicate racketeering offenses that inflict personal injury, such as murder or kidnapping.[16]

The type of injury Congress *did* intend to remedy under the RICO treble damage provision is a distinct form of business injury caused by the unlawfully-gained economic advantage which a racketeer obtains over legitimate business. This conclusion is clear when the statutory language is read in light of RICO's primary purpose, which, as this Court held in *Turkette, supra,* was to "cope with the infiltration of legitimate businesses" by organized crime. 452 U.S. at 591. As observed recently by Judge Friendly,

> "From the start Congressional concern centered on the problem of 'black money,' the purchase and operation of legitimate businesses with the proceeds of illegal endeavors." *United States v. Ivic, supra,* 700 F.2d at 62 (citing legislative history).

The primary, anti-infiltration purpose of RICO is most directly addressed by 18 U.S.C. § 1962(a) of RICO, which makes it a violation for a person to invest "income derived" from a "pattern of racketeering activity" into a distinct "enterprise." As stated in *Turkette,* the purpose of RICO civil remedies is to deal with the "ill-gotten gains" that may be so invested. 452 U.S. at 585. Where "ill-gotten gains" are invested in an enterprise in violation of § 1962(a), the person

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[16] In this regard it is instructive to contrast § 1964(c) with the Arizona RICO-type statute, which allows treble damages to a person "who sustains injury to his *person,* business or property *by racketeering . . . or* by a violation" of the Arizona RICO statute. Ariz. Rev. Stat. Ann. § 13-2314 (emphasis added) The Arizona Supreme Court has observed that the wording of the federal statute is more restrictive than that of the Arizona statute, and that under the federal statute there is "no cause of action for one injured directly by racketeering." *Arizona v. Pickrell,* No. 16375-SA (Arizona Sup. Ct. July 21, 1983) (*en banc*).

"injured in his business or property by reason of" the violation is a person whose injury flows from the *investment* in the enterprise. A person whose injury stems from the underlying pattern of racketeering activity from which the income was derived—such as a person whose money was taken in a swindle—has not been injured "by reason of" the RICO violation, since it is not the obtaining of such ill-gotten gains but instead the investment of them into an "enterprise" that constitutes the RICO violation. The proper RICO plaintiff, therefore, is the person injured economically by the investment of the ill-gotten gains in the enterprise—not the person injured, however grievously, by the taking of those gains in the first place.

In this case, it is alleged that mail fraud was committed when allegedly false audited financial statements of ARC and Reserve and documents relating to the reinsurance agreements were sent through the mails. The court of appeals construed the complaint to allege further that ARC was an "enterprise" conducted "through" the mail fraud, in violation of 18 U.S.C. § 1962(c). The claimed injury, while arguably the basis for a state law claim, is *not* the kind of injury for which Congress enacted the RICO treble damage provision.

Like § 1962(a) which it complements, the prohibition of § 1962(c) of RICO is aimed at the same evil—the securing of economic advantage for an "enterprise" controlled or financed by racketeers. Whereas § 1962(a) proscribes the investment of "income derived" from racketeering into an enterprise, § 1962(c) proscribes the use of racketeering activity to conduct the affairs of the enterprise—creating economic advantage for the enterprise that is equivalent to investment in the enterprise of funds from an outside source. *See United States v. Mandel*, 591 F.2d 1347, 1375 (4th Cir.), *opinion on rehearing*, 602 F.2d 653 (4th Cir. 1979) *(en banc)*, *cert. denied*, 445 U.S. 961 (1980). As when a violation of § 1962(a) is the basis for a treble damage claim, a treble damage suit based upon a violation of § 1962(c) requires injury distinctively caused by the RICO violation, and not merely caused by the predicate acts. When a violation of § 1962(c) is alleged, a RICO plaintiff must allege injury caused by the economic advantage the

enterprise obtained by the violation, not merely injury that has occurred because of the predicate acts themselves.

The complaint in the present case is deficient in this regard. The injury to "business or property by reason of" any RICO violation alleged may have been incurred by other insurance companies from which Reserve may have diverted business—a form of injury for which there may be no other remedy. The complaint, however, does not allege that plaintiff or anyone he claims to represent suffered injury of this type.

2. The decision of the court of appeals conflicts with the legislative history.

The legislative history of RICO is devoid of any suggestion that injury resulting from predicate acts may be redressed by a treble damage suit under RICO. The court of appeals erred in concluding otherwise. As Senator Hruska, orginator of the language that now appears in 18 U.S.C. § 1964(c) explained, the treble damage provision of RICO was modeled on § 4 of the Clayton Act and was intended for use by "the honest businessman who has been damaged by unfair competition from the racketeer businessman." Senator Hruska expressed concern that, while such a legitimate businessman theoretically might have a remedy under the antitrust laws, the antitrust remedy might be unavailable "as a practical matter." The Senator's proposal to aid "the businessman competing with organized crime" was designed to redress this particular form of economic disadvantage. 115 Cong. Rec. 6993 (1969).

Perhaps concerned that courts might otherwise superimpose such antitrust doctrines as a requirement of injury to competition and not just injury to the business or property of a plaintiff, *see Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., supra,* 429 U.S. at 489, Senator Hruska apparently did not intend to require antitrust injury. Instead, he invoked the concept of *unfair* competition, which has historically protected not competition at large but an individual entrepreneur's business opportunity. *See generally* W. Prosser, *Law of Torts* § 130 at 950-956 (4th ed. 1971).

Thus, the statements by the originator of the language of 18 U.S.C. § 1964(c) clearly show that the intent was *not* to create a new remedy for predicate acts such as mail fraud, but instead to direct the new remedy at a specific form of business injury—the impairment of a businessman's ability to compete because of unlawfully obtained economic advantage—a form of injury perceived to lack any *other* effective remedy at the time. Although Senator Hruska's proposed treble damage remedy was deleted from the organized crime bill passed by the Senate, Senator Hruska's language was restored in the House, where the Senator's intention as to the purpose of the language was reaffirmed. For example, then-Representative Mikva, an opponent of RICO who might have tended to overstate its "horribles," specifically addressed the treble damage provision and criticized it only on the ground that it could be abused when "any *competitor* may go in and seek three-fold damages." 116 Cong. Rec. 35342 (1970) (emphasis added).[17]

3. The decision of the court of appeals conflicts with other court decisions.

Although there are decisions going both ways on the issue (App. 27a-28a), numerous district courts have recognized that

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[17] Senator Hruska's treble damage proposal was originally made in the 90th Congress as part of a package of proposed anti-racketeering amendments to the antitrust laws. When those proposals lapsed in the 90th Congress, the Senator reintroduced them in the 91st Congress as separate legislation. 115 Cong. Rec. 6993 (1969). Section 4(a) of Senator Hruska's bill in the 91st Congress (S.1623) contains the provisions enacted as 18 U.S.C. § 1964(c). Although S.1623 was referred to the Senate Judiciary Committee, the bill reported by that Committee and passed by the Senate (S.30, the forerunner of the Organized Crime Control Act of 1970) had *no provision for private remedies* in the RICO title. *See* S. Rep. No. 617, 91st Cong., 1st Sess. (1969). After the House added Senator Hruska's proposed treble damage language as part of a package of amendments to the Senate-passed organized crime bill, the Senate then acquiesced in all House amendments. For a review of the pertinent legislative history, *see Harper v. New Japan Securities Int'l, Inc., supra,* 545 F. Supp. at 1004-1005.

The statements of Senator Hruska quoted in text were completely ignored by the court below. Instead, the court of appeals cited other statements in congressional debates (App. 28a-30a), but did not acknowledge that such statements referred to the criminal provisions of RICO and in many cases concerned proposed legislation that contained no private remedy at all.

a RICO plaintiff must show injury distinctively caused by the RICO violation and have held that injury flowing from an alleged mail fraud does not suffice. *See, e.g., Moss v. Morgan Stanley,* No. 83-7120, slip op. at n.16 (2d Cir. Sept. 9, 1983) (corrected opinion) (noting a "growing number of courts that have limited standing under 18 U.S.C. § 1964(c) to those 'plaintiffs alleging something more, or different, than direct injury resulting from the predicate acts,' " citing cases; court declines to resolve issue for Second Circuit); *Noland v. Gurley,* 566 F. Supp. 210, 218 (D. Colo. 1983); *Cross v. Price Waterhouse & Co.,* [1982-83 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,153 at 95,567-68 n.4 (D.D.C. 1983); *Erlbaum v. Erlbaum, supra,* [1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 93,922-23; *Harper v. New Japan Securities Int'l., Inc., supra,* 545 F. Supp. at 1005-1008; *Bays v. Hunter Savings Assoc., supra,* 539 F. Supp. at 1023; *Landmark Savings & Loan v. Loeb Rhoades, Hornblower & Co.,* 527 F. Supp. 206, 208-209 (E.D. Mich. 1981); *North Barrington Development, Inc. v. Fanslow,* 547 F. Supp. 207, 210-11 (N.D. Ill. 1980).

Some of the foregoing decisions have labeled the injury redressable under 18 U.S.C. § 1964(c) as "racketeering enterprise injury" or "competitive injury." Of less importance than the label, however, is the conclusion that injury traceable to predicate acts—such as mail fraud—is *not* enough to support a RICO treble damage claim.

In addition to the foregoing decisions recognizing this compelling injury requirement, a number of decisions have suggested or imposed other limitations upon private RICO actions. For example, several decisions have required allegations of organized crime involvement in private RICO cases. *See, e.g. Hokama v. E. F. Hutton & Co.,* [Current] Fed. Sec. L. Rep. (CCH) ¶ 99,415 at 96,384-85 (C.D. Cal. 1983); *Waterman Steamship Corp. v. Avondale Shipyards, Inc.,* 527 F. Supp. 256, 260 (E.D. La. 1981); *Barr v. WUI/TAS, Inc.,* 66 F.R.D. 109, 113 (S.D.N.Y. 1975). *But see, e.g., Moss v. Morgan Stanley, Inc., supra* (corrected opinion). Other courts have indicated doubts about whether a private RICO action can be maintained in the absence of a conviction or indictment for the

predicate acts or the RICO violation. *Van Schaick v. Church of Scientology, supra,* 535 F. Supp. at 1137 n.12; *Kleiner v. First National Bank of Atlanta, supra,* 526 F. Supp. at 1022 n.2. *See also Trane Company v. O'Connor Securities,* No. 83-7336 (2d Cir. September 19, 1983) (reserving decision on whether conviction of predicate acts is required in private RICO case).

The current state of the law concerning private RICO shows disarray and a need for this Court's intervention to provide uniform guidance on the elements of a RICO treble damage claim. The court of appeals is not alone in upholding private RICO claims proceeding on a common law fraud theory, but the Seventh Circuit panel is the first appellate court to legitimize a "runaway treble damage bonanza" under RICO. (App. 36a) Other courts of appeals have tried either to avoid passing upon the injury issues decided by the court of appeals here or to apply other limiting principles to prevent private RICO actions from swallowing common law fraud. *See, e.g., Dan River, Inc. v. Icahn, supra,* 701 F.2d at 291 (private RICO action appeared "far removed from the context which Congress had in mind when it enacted the statute"); *Moss v. Morgan Stanley, Inc., supra,* slip op. at n.16 (corrected opinion) (Second Circuit declined to resolve injury requirements while deciding that plaintiff who was not the victim of fraud had no fraud-based RICO claim); *Morosani v. First National Bank,* 703 F.2d 1220, 1222 (11th Cir. 1983) (Eleventh Circuit addressed nature of mail fraud under RICO but specifically declined to consider other limiting principles). *See also Cenco, Inc. v. Seidman & Seidman,* 686 F.2d 449, 457 (7th Cir.), *cert. denied,* 103 S.Ct. 177 (1982) (Congress did not intend to create "waves of treble damage suits" in the "wake of every RICO violation;" accounting firm not permitted to sue audited company on a fraud-based RICO claim).

This Court's intervention is now imperative. Without this Court's review at this time, the erroneous interpretation of the RICO treble damage provision given by the court of appeals may be perpetuated, and the burdens on courts and litigants set in motion by the "runaway treble damage bonanza" will be impossible to undo.

II. THIS COURT SHOULD DECIDE WHETHER A CORPORATION THAT PARTICIPATES IN A RICO VIOLATION MAY SUE FOR TREBLE DAMAGES TO BE DISTRIBUTED TO THIRD PARTIES ALREADY SUING IN THEIR OWN BEHALF.

An anomaly of the decision below is that it upholds a fraud-based RICO treble damage claim brought on behalf of Reserve, whereas Reserve has no fraud claim for single damages. The complaint alleges that every officer and director, of Reserve, as well as of ARC (Reserve's sole shareholder) was aware of Reserve's insolvency, and that the allegedly false financial statements of Reserve and the reinsurance agreements concealed the insolvency from persons outside Reserve and allowed Reserve to remain in business. As the court of appeals recognized, under Illinois law governing the attribution of knowledge or actions to corporations—which the Seventh Circuit had just applied in the non-RICO aspects of *Cenco, Inc. v. Seidman & Seidman, supra*—Reserve had no claim against outsiders that it had been defrauded as to its own financial condition.[18] With plaintiff thus unable to bring a *fraud* claim on behalf of Reserve, the court of appeals held that the plaintiff could nevertheless bring a fraud-based *RICO* claim because of unspecified "federal policies." (App. 7a)

The attribution principles governing claims by corporations that the court of appeals discarded in the context of RICO are, however, applicable to claims under a variety of federal statutes, including the antitrust and securities laws. For example, a full, willing, and equal participant in an alleged antitrust violation cannot maintain a treble damage suit. *E.g., Driebus v. Wilson,* 529 F.2d 170 (9th Cir. 1975); *Premier Electrical Construction Co. v. Miller-Davis Co.,* 422 F.2d 1132, 1138 (7th Cir.), *cert. denied,* 400 U.S. 828 (1970). Similarly, in actions under the federal securities laws, an entity committing "serious wrongdoing" cannot escape "scot-free" by

[18] Plaintiff tried to overcome this difficulty by alleging that, as successor to Reserve's claims, he represented Reserve's policyholders, creditors, and shareholders. However, the court of appeals recognized that under Illinois law the director could pursue "no action which could not have been asserted directly by Reserve before liquidation." (App. 6a n.3)

shifting its entire loss to an outsider. *Cenco, Inc. v. Seidman & Seidman, supra,* 686 F.2d at 458; *Heizer Corp. v. Ross,* 601 F.2d 330, 334-335 (7th Cir. 1979); *Globus v. Law Research Service, Inc.,* 418 F.2d 1276, 1287-1288 (2d Cir. 1969), *cert. denied,* 397 U.S. 913 (1970).

The allegations of the complaint in this case charge that Reserve was a willing, equal participant in any RICO violation and Reserve therefore should not be permitted to bring a RICO treble damage action against an outsider. The court of appeals held, however, that the alleged acts and knowledge of Reserve's officers, directors, and shareholders should not be attributed to Reserve because, with Reserve in liquidation, any recovery by Reserve would go first to Reserve's policyholders and creditors, who were "entirely innocent parties," and Reserve's shareholders (in reality, its sole shareholder, ARC) would be "last in line for recovery." (App. 10a) This reasoning of the court of appeals will not withstand analysis and provides no justification for discarding attribution principles of otherwise universal application.

The "entirely innocent parties" cited by the court of appeals—Reserve's policyholders and creditors—have brought their *own* suits for damages; indeed there is also a suit by Reserve's sole shareholder [ARC] which plaintiff also purports to represent and which the court of appeals did *not* characterize as "entirely innocent." By allowing a suit to be maintained on behalf of Reserve itself, the court of appeals introduced the considerable risk of duplicative recovery (because multiple suits have been brought for the same or overlapping injury[19]), and the risk of participation by alleged wrongdoers in any recovery of treble damages.

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[19] *See* n.3, *supra.* The history of the litigation brought by the bankruptcy trustee of ARC vividly demonstrates the mischief of the interpretation given RICO by the court below. On July 22, 1983, the trustee's state court complaint in *Holland v. Arthur Andersen & Co.,* (Cir. Ct. Cook Cty, Ill., No. 82-L-20763) was dismissed on the ground, among others, that state law gave ARC no fraud claim against outside accounting firms for the alleged "concealment" of facts known to ARC's directors and officers. The ARC trustee responded to the dismissal of his fraud complaint in state court by filing a fraud-based *RICO* complaint in *federal* court. *Holland v. Arthur Andersen & Co.,* N.D. Ill. No. 80-B-4786, Adversary Proceeding 83-A-2485.

There is a strong federal policy favoring avoidance of "either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other." *Associated General Contractors, Inc., supra,* 103 S. Ct. at 912, 74 L. Ed. 2d at 742. *See also Illinois Brick Co. v. Illinois,* 431 U.S. 720, 730-736 (1977). This policy has special force where the injury results, not from a wrong done to the plaintiff, but from a "chain" of actions allegedly taken against third parties. *Associated General Contractors, Inc., supra,* 103 S. Ct. at 910, 74 L Ed 2d at 739. This situation is presented here. The injury alleged is "deepening of Reserve's insolvency" (App. 13a)—not by a fraud upon Reserve (or upon its sole shareholder, ARC), but by an alleged fraud upon the state insurance department, which then allegedly permitted ARC's and Reserve's directors to continue operating Reserve "beyond its insolvency." (App. 31a)

In enacting RICO, Congress gave no indication that it intended the courts to ignore these principles and policies against multiple suits for the same or overlapping injury, and the court of appeals offered no justification for discarding them. The decision below will unnecessarily proliferate the number of RICO suits; defendants will either be subjected to the risk of duplicative treble damage recoveries or the courts will have to undertake enormously complicated—and perhaps futile—efforts to apportion damages. This Court should review the court of appeals' decision allowing this result.

III. THIS COURT SHOULD REVIEW THE DECISION BELOW THAT THE RICO CASE MAY PROCEED AGAINST THE INDEPENDENT OUTSIDE ACCOUNTANTS AND REINSURERS, RESPECTIVELY, AND RESOLVE THE CONFLICT BETWEEN THE DECISION BELOW AND A RECENT *EN BANC* DECISION OF THE EIGHTH CIRCUIT.

Section 1962(c) of RICO makes it unlawful for a "person" that is "employed by or associated with" an "enterprise" to "conduct or participate in the conduct of the affairs" of that enterprise "through a pattern of racketeering." Reading the complaint to allege a violation of § 1962(c) involving ARC as

the enterprise, the court of appeals held that each of the following was properly included as a defendant:

> a) the three independent accounting firms that are alleged [in count IV (App. 32f-35f)] to have examined and reported on the financial statements of ARC and/or Reserve; and
>
> b) the two reinsurers that are alleged [in count II (App. 27f-29f)] to have been involved in the mailing of these statements and to have mailed documents relating to the reinsurance agreements.

The sole basis for the conclusion that a violation of § 1962(c) was alleged against the foregoing defendants was the statement that 18 U.S.C. § 1962(c) applies to anyone "associated with" an enterprise. (App. 34a) Section 1962(c), however, does not prohibit association with an enterprise. There is an additional, critical element under § 1962(c)—a defendant must "conduct" or "participate . . . in the conduct of" the "affairs" of the enterprise. The court of appeals ignored this element.[20]

The court of appeals' opinion conflicts in this regard with the recent *en banc* decision of the Eighth Circuit in *Bennett v. Berg*, 710 F.2d 1361 (8th Cir. 1983). Although the *en banc* Eighth Circuit reversed the dismissal of a RICO complaint, the court directed the district court to require the plaintiff to show the basis for charging a number of professionals and entities outside the "enterprise" with violations of § 1962(c). In line with decisions in two other circuits, the Eighth Circuit held that under § 1962(c), a "defendant's participation must be in the conduct of the affairs of a RICO enterprise, which ordinarily will require some participation in the operation or management of the enterprise itself." *Id.* at 1364. *See United States v.*

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[20] Although ignored by the court below, this issue was briefed by the parties, once the plaintiff, in his brief on appeal, set forth the § 1962(c) violation that the court below held the complaint could be read to allege. *See, e.g.*, Brief of Arthur Andersen & Co., September 7, 1982 at 26, n.5; Reply Brief of Accountant Appellants Alexander Grant & Co. and Coopers & Lybrand, November 5, 1982 at 28-30; Reply Brief of SCOR, November 5, 1982 at 14-17.

Zemek, 634 F.2d 1159, 1172 (9th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981); *United States v. Mandel, supra*, 591 F.2d at 1375-1376.

Accordingly, the Eighth Circuit in *Bennett v. Berg* remanded the case so that various outside defendants could raise by "appropriate motions" whether they should "remain in the case until its conclusion on the merits." 710 F.2d at 1365. The court observed that a "district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Id.* at 1365, citing this Court's decision in *Associated General Contractors of California, Inc., supra.*

The requirement that a defendant charged with violating § 1962(c) be involved in the operation or management of the enterprise is supported by the definition of "conduct"[21] as well as by the legislative history. *See* H. R. Rep. No. 1549, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Ad. News 4007, 4010. The complaint in this case, however, attacks the accounting firms only as outside auditors, who report upon financial statements but d not participate in management of the audited company. It attacks the reinsurers only as companies that contracted with Reserve and its affiliates. This Court should grant review to correct and clarify the proper application of the essential elements of § 1962(c).

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[21] RICO § 1962(c) uses "conduct" as both a verb and a noun. As a verb, "conduct" is defined as "to have the direction of: run, manage, direct" and is synonymous with "manage, control or direct." *Webster's Third New International Dictionary* 474 (1971). When used as a noun, it refers to the "act, manner or process or carrying out (as a task) or carrying forward (as a business, government, or war)." *Id.* at 473. The construction of § 1962(c) set forth in the text is derived from the plain dictionary meaning of the statutory language.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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STATUTORY APPENDIX
18 U.S.C. §§ 1961-1964

§ 1961. Definitions

As used in this chapter—

(1) "Racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense, involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation,

receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or

decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity of the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable

for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue

therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

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